DOCUMENT RESUME

ED 260 554 EC 180 521

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| AUTHOR | Singer, Linda R.; Nace, Eleanor |
| TITLE | Mediation in Special Education: Two States' Experiences. |
| INSTITUTION | National Inst. for Dispute Resolution, Washington, DC. |
| REPORT NO | NIDR-R-1 |
| PUB DATE | 85 |
| NOTE | 18p. |
| AVAILABLE FROM | National Institute for Dispute Resolution, 1901 L Street, N.W., Washington, DC 20036 (free while supply lasts). |
| PUB TYPE | Reports - Evaluative/Feasibility (142) |
| EDRS PRICE | MF01/PC01 Plus Postage. |
| DESCRIPTORS | *Arbitration; *Conflict Resolution; *Disabilities; Due Process; Legislation; *Parent School Relationship; State Standards |
| IDENTIFIERS | *California; Massachusetts |

ABSTRACT

The report examines the use by two state governments of mediation to resolve disputes between schools and parents of handicapped children. Officials, parents, educators, and legal personnel from California and Massachusetts were interviewed, mediations were observed, mediation agreements examined, and statistics reviewed. A typical case illustrates the mediation process. Findings revealed a striking uniformity in process in the two states as well as in the identity of the disputants. The proportion of disputes successfully resolved in mediation has increased from 1981-1983 in California, and has been holding steady in Massachusetts since 1983. It was evident that overall, disputants are extremely satisfied with the mediation process, although parents clearly feel the schools have significantly more power than do parents. It is suggested that mediation is a success in resolving disputes because it nurtures rather than destroys trust and cooperation among people interested in special education. (CL)

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*A series of reports from*
**NATIONAL INSTITUTE FOR DISPUTE RESOLUTION**

# Mediation in Special Education

TWO STATES' EXPERIENCES

by **LINDA R. SINGER**
and **ELEANOR NACE**
Center for Community Justice

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# Acknowledgments

We thank Barry Zolotar, Assistant Chief Counsel, California State Department of Education, and Carol Kervick and Stephen Bardige, Director and Assistant Director of the Bureau of Special Education Appeals in the Massachusetts State Department of Education. Without their willingness to participate in the study, to open their records and offices, to give access to mediators, and to provide the data we needed, this report could not have been written. Special thanks go to Eva Zeleny, in Sacramento, for her excellent advance work in California.

Although the preparation of this report required statistical analysis, legal research, and review of documents, our conclusions—and their value—are based largely on interviews and observations of mediation sessions. We cannot personally thank everyone who spoke with us, nor is it appropriate to acknowledge all of them here, since many requested anonymity. However, we express our thanks to those people who agreed to share their views with us or to have us observe mediations in which they participated. Our debt to each of you is enormous.

Mediation in Special Education: Two States' Experiences
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Report design by Susan Lehmann
Typesetting by VIP Systems, Inc.
Printing by Arrow Printing Service, Inc.

Library of Congress Catalog Number: 85-061963

The Center for Community Justice, a nonprofit organization located in Washington, D.C., has been active since 1971 in designing, operating and evaluating alternative methods of resolving disputes in community and institutional settings.

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# Foreword

This is the first in a series of brief reports of research and other projects sponsored by the National Institute for Dispute Resolution. Through *NIDR Reports*, the Institute intends to share information it has developed with the growing number of Americans who are using the tools of dispute resolution to settle differences in a diversity of areas. One such area is special education.

Under federal law passed in 1975, parents have due process safeguards allowing them to become directly involved in the development of specific education plans for their handicapped children. If parents object to a local school administration's planning or provision of special education services, they may contest the plan. Since Congress passed the law, several states have incorporated mediation into their due process systems for special education.

But can disputes between parents and school administrations over special education plans be mediated successfully? The Institute asked Linda R. Singer and Eleanor Nace of the Center for Community Justice to study the question. Singer and Nace examined the use of mediation in two states. Their answer "is a resounding 'yes.' Satisfaction with mediation processes studied in Massachusetts and California is broad and deep."

Several factors contribute to the successful use of mediation in disputes involving special education. Among them are the clear framework of laws governing special education cases; the availability of strong advocates who care about the needs of handicapped children; and broad community interest in resolution of special education disputes.

Singer and Nace conclude that "perhaps, ultimately, the reason that mediation is so successful in this arena is that it is a process that nurtures rather than destroys ... trust and cooperation ... among people with an interest in the education of special children."

Future *NIDR Reports* will include publication of research findings on the uses of dispute resolution methods in several other areas. For now, the Institute is pleased to inaugurate this news series with a report on a subject, special education for handicapped children, that affects millions of Americans.

Madeleine Crohn
*President*
National Institute for Dispute Resolution

# 1. Public Law 94-142:

# The Education for all Handicapped Children Act

Passage by Congress of the Education for all Handicapped Children Act in 1975 was one of the most significant events in American educational history. The Act was the culmination of years of effort by parents and advocacy groups. Earlier victories had occurred in the courts and state legislatures, but with the enactment of Public Law 94-142, special education throughout the country was dramatically altered, both substantively and procedurally.

One of the most significant changes accomplished by the Act was the extension of due process safeguards to procedures for identifying and developing programs for children with special needs. Henceforth, parents would be directly involved in the education of their handicapped children from the initial evaluation onward. If at any point parents were dissatisfied with the local education agency's planning or provision of special educational services, they were given the right to contest the plan.

## Substantive Provisions of Public Law 94-142

The purpose of the Education for all Handicapped Children Act of 1975 is "to assure that all handicapped children have available to them ... a free appropriate education ..." To meet this goal, the Act provides federal funds to state and local educational agencies to assist in educating handicapped children.

To qualify for federal aid under the Act, a state must show that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. Section 1412(1). Each state is required to submit a plan articulating this policy, and describing the programs under which the state intends to educate handicapped children.

In 1982, the United States Supreme Court issued an opinion that discussed in detail the meaning of a "free appropriate public education." *Board of Education* v. *Rowley*, 458 U.S. 176 (1982). The Court reversed the decisions of two lower courts that a bright, deaf first grader, who was "not learning as much, or performing as well academically, as she would without her handicap" because she did not understand much of what occurred in the classroom, was not receiving a free appropriate education. The courts below held she was denied "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." But the Supreme Court stated that Congress' intent in passing the Act was:

> to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child. Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded the handicapped children. 458 U.S. at 189 (emphasis in original).

The Court concluded that a handicapped child receives a "free appropriate education" if he or she receives "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction," even if the child is not achieving his or her maximum potential. 458 U.S. at 203.

## Procedural Provisions of Public Law 94-142

Public Law 94-142 requires that an "individualized educational program" (IEP) be developed for each handicapped child, to ensure that he or she is receiving an appropriate public education. Section 1412(4). The IEP is developed at a meeting among the child's parents, the child's teacher, various specialists, and a representative of the local educational agency. The plan must contain, among other things, a statement of the child's current educational level, a statement of annual goals, and a description of the specific serv-

ices to be provided to the child. In preparing an IEP, the goal is to educate the handicapped child with nonhandicapped students "to the maximum extent appropriate." Section 1412(5).

The Act provides procedural due process protections to parents dissatisfied with the educational programs prepared for their handicapped children. A state or local educational agency must provide parents with prior written notice of any proposed change in "the identification, evaluation, or educational placement of the [handicapped] child or the provision of a free appropriate public education to the child." Parents can bring a complaint about "any matter relating to their child's evaluation or education." 20 U.S.C. Section 1415.

Public Law 94-142 requires that parents be provided an "impartial due process hearing" on their complaint, and the right to appeal to the state educational agency if their hearing is held at the local level. States have considerable leeway in designing their due process systems, provided that the rights mandated by the Act are included. Either the parents or the educational agency may file suit in federal court if they disagree with the state agency's decision. However, the Supreme Court ruled recently that parents who prevail in court are not entitled to reimbursement of attorneys' fees spent in the administrative or judicial process. *Smith* v. *Robinson*, 52 USLW 5179 (July 5, 1984).

### The Use of Mediation Under Public Law 94-142

The Act itself does not mention mediation as a means of resolving parents' complaints, nor do the regulations promulgated by the Department of Education to implement the Act. 34 C.F.R. Section 300 *et seq.* However, a "comment" to the regulations states that:

> Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local education agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart. Comment following 34 C.F.R. Section 300.506.

Neither the regulations nor the comments provide any substantive or procedural guidelines for mediation. Interviews with Department of Education officials indicate that the Department maintains a "hands off" posture with respect to mediation. Their only concern is that due process rights not be delayed or impeded.

In 1976, Massachusetts became the first state to incorporate mediation into its due process system in special education. Since then a growing number of states, in their efforts to comply with the requirements of the law, have included some form of mediation as part of their appeals process. In a 1982 survey, the National Association of State Directors of Special Education discovered that 11 states provided for mediation (sometimes loosely defined) in their regulations; another 22 states encouraged the use of mediation or other settlement efforts prior to hearings.

# 2. The Center's Study

As the use of mediation has grown, so has the interest in studying the process and its utility. In 1983, the National Institute for Dispute Resolution awarded a grant to the Center for Community Justice (CCJ) to conduct two case studies. These studies examined the use by governments of nontraditional methods of resolving disputes between individuals and institutions. One case study examined the use of mediation by state education agencies. The following summarizes CCJ's report of that research.

Two states were selected for study: Massachusetts, which has the most experience with the process, and California, where mediation has been in use for three and one-half years. Both states handle a high volume of appeals. Initial research centered on the federal statute, regulations, and case law, followed by interviews with officials of the Department of Education and representatives of three interest groups located in Washington: the Children's Defense Fund, the Parent Educational Advocacy Training Center, and the National Association of State Directors of Special Education.

In Massachusetts, the following people were interviewed at the state level: a member of the State Board of Education; the Associate Commissioner for Special Education, Massachusetts State Department of Education; and the Director and the Assistant Director of the Bureau of Special Education Appeals, Massachusetts State Department of Education. Also interviewed were local school officials; mediators; parents; two long-term observers and researchers in due process in special education; lay advocates; two attorneys, one who represents parents and one who represents school districts; and representatives of special interest groups, namely the Federation for Children with Special Needs, Massachusetts Advocacy Inc., and the state's Office for Children. Copies of mediation agreements, with the names of the parties removed, were reviewed. We observed three mediations, with the consent of the disputants, who were interviewed afterward.

In California, we interviewed the following: the Administrative Assistant to the Director of the Office of Special Education, California State Department of Education; the former Director of the Due Process Hearings Unit, who is now the federal liaison for the State Department of Education; the Director of the Due Process Hearings Unit, who is also the Assistant Chief Counsel for the State Department of Education; and the Legal Assistant in the Due Process Hearings Unit. In addition to observing one mediation and interviewing the participants afterward, we interviewed mediators; parents; private lay advocates; local school officials; and representatives of interest groups, namely Team of Advocates for Special Kids (TASK), Protection and Advocacy, Inc., and Community Alliance for Special Education (CASE), as well as an advocate from one of the state's regional centers.

Each state initially agreed to provide us access to complete mediation files; however, strictures of confidentiality and the difficulty inherent in removing all identification for our review made access impossible. Nevertheless, we were able to observe mediations, to examine numerous samples of mediation agreements, and to review statistics provided by both states.

# 3. The Massachusetts and California Systems

### Massachusetts

Massachusetts school districts did not have to scramble to comply with Public Law 94-142. A similar law, on which the federal statute was based in part, had passed the Massachusetts Legislature in 1972 and took effect in 1974. Just as it led the nation in creating rights for the handicapped, so too did Massachusetts pioneer in its methods for resolving disputes over those rights. Even before dissatisfaction with the formal due process hearings surfaced, Massachusetts was experimenting with mediation on an informal basis. A prehearing mediation stage was formally added to the appeals process in 1976.

The Massachusetts State Department of Education currently employs six full-time mediators. Each of them is assigned to one of the Department's regional offices. The mediators' prior occupations vary; they include a former priest, a social worker, an actuary, and a prison official. None of the mediators is an attorney; all appear to be warm, friendly people, generally outgoing in personality.

Most appeals are sparked by discontent with a child's IEP. A simple notation on an IEP by the parents that they do not accept the plan in full triggers the appeal process. Upon rejection of an IEP, the school forwards a copy of the rejected IEP to the Bureau of Special Education Appeals and to the appropriate mediator. In some cases, the parents simultaneously sign a letter saying that they waive mediation and wish to go directly to a due process hearing. According to the Director of the Bureau, such waivers occur in five to ten percent of the cases. The remaining cases are assigned to a mediator. At that point, the mediator contacts the parents to explain the process and to schedule a mediation. In addition, some informal efforts at resolution may be attempted, through telephone conversations with the school and the parents. Assuming these are unsuccessful, a mediation is scheduled.

In the event that mediation does not produce a settlement, either party may request a due process hearing before the Bureau. The Bureau encourages but does not require the parties to avail themselves of mediation before requesting a hearing. All discussions during the mediation session or prior to it are confidential and privileged. Mediation files are kept separate from any subsequent hearing files.

### California

In California as well, conflicts most often arise in connection with the development of the IEP. However, a due process hearing procedure can be initiated at any time by a pupil, a parent, or a public education agency.

The California Education Code, which incorporates the procedural safeguards of Public Law 94-142, states that it is the "intent of the legislature that the mediation conference be an intervening, informal process conducted in a nonadversarial atmosphere." The mediation conference is conducted prior to the administrative due process hearing; it can be waived by either party. Mediation is supposed to be completed within 15 days of receipt by the superintendent of the request for a hearing. The mediator may grant continuances beyond the 15-day deadline. A continuance cannot extend the 45-day maximum for completion of the due process hearing and decision, however, unless the party initiating the request for a hearing agrees to such an extension.

Other Education Code sections state that a mediation conference "shall be conducted by a mediator knowledgeable in the laws governing special education under contract with the department," and that the mediation should be held at a time and place that is reasonably convenient to the parent and student. Prior to a mediation conference, parents have the right to receive and examine copies of any documents con-

tained in the child's file. Parents also have the right to be accompanied by a representative of their choice. If the mediation is unsuccessful, the mediator prepares a list of unresolved issues, which is signed by the initiating party prior to the conclusion of the mediation. This list then forms the basis for the state-level hearing.

Thus, although California statutory law provides more structure to the mediation process than do the governing provisions in Massachusetts, much is left to the discretion of the superintendent and, in turn, to the due process hearings unit. The current due process procedure, including the mediation component, has been in existence for three and a half years, and was preceded by a number of other designs. Under the current procedure, hearing officers at the due process level are state employees working for a separate agency, the Office of Administrative Hearings.

Each year, the California State Department of Education issues a Request for Proposal for the position of mediator. The state currently has eight active, part-time mediators on contract. Despite annual contracting, mediators tend to be long-term employees; some of them were members of the original trainee class three and a half years ago.

The backgrounds of the mediators are varied. One is a retired school principal and special education director; another has 10 years' experience in public school teaching and paralegal work, with a specialization in education law. Three mediators are self-employed attorneys in the San Francisco area; one has an active practice in private sector labor law in addition to the special education mediation. Another mediator has been a college administrator and government worker, and is the parent of a handicapped child. Another has a counseling background.

The mediator's first contact with a case is a letter or telephone call from the due process hearings unit, notifying the mediator that a conference has been scheduled. The parties' names and telephone numbers, and perhaps a one-word description of the issue, are provided. Some mediators contact the parties by telephone to confirm the mediation date and to explain the process. Others read the child's file, while some make no effort to acquire any additional information.

At this time, the parties also receive a letter from the due process hearings unit containing the same information. The parents are also sent a "notice of procedural safeguards," which includes a description of mediation.

At the conclusion of each mediation, the mediator completes a report that includes the names of the petitioner, respondent, student, and mediator, and specifies whether an agreement was reached or a continuance agreed to. If an agreement is reached, a copy is attached to the mediation report and returned to the due process hearings unit in Sacramento. If no agreement is reached, a statement of issues is completed by the mediator, signed by the petitioner, and attached to the mediation report. This statement forms the basis of the formal due process hearing, if one is held.

# 4. A "Typical" Case

On October 1, 1980, a young wife gave birth, prematurely, to twins. One died. The second baby, a girl, survived but, unknown to her parents, had been deprived of oxygen during delivery. This resulted in a mild case of cerebral palsy.

The mother obtained the best available services, and paid a private physical therapist to visit her home once a week to work with the little girl and teach the mother how best to assist her. When the mother was at her part-time job, the child attended a private nursery school with "normal" children.

Shortly before the girl's third birthday, her mother took her to the local public school and asked for an evaluation of the child and some assistance. She intended to continue to pay the costs of the private nursery school rather than to place the child in the public school's preschool program, where she would be exclusively with handicapped children. However, she wanted the school department to assume responsibility for the various therapies that her daughter would need in order to benefit from education.

The school acceded to some of her demands, agreeing to provide occupational therapy and consultation with the day-care program. But the school resisted the mother's request of one hour of physical therapy each week. The IEP prepared by the school department proposed 30 minutes of physical therapy every two weeks. The mother balked. The girl was making progress, and the mother feared that she would regress severely unless this level of therapy was maintained. Nonetheless, the school department refused to modify its position, so the mother rejected the IEP, triggering the appeals process. The school district forwarded the rejected IEP to the regional mediator and the state's Bureau of Special Education Appeals. A mediation conference ensued.

The mother, a shy, reserved person, was accompanied by an advocate from the State's Office for Children. The special education director was accompanied by the physical therapist who had prepared the school's therapy recommendations, and who would have provided the therapy. The nursery school teacher was present. Completing the group were the mediator and an observer.

The mediator opened the session by explaining the process and emphasizing its confidentiality, its informality, and the desire that a settlement acceptable to all parties would be achieved. The parent's advocate spoke first. She began by outlining the child's history, the outcome of the team meetings, and the reasons for the parent's rejection of the IEP. The parent's other requests were for more frequent consultation between the school district and the nursery school program, and the provision of therapy (both occupational and physical) throughout the summer.

The Special Education Director then stated the school's position that the child did not need one hour of physical therapy per week, and that 30 minutes every two weeks was adequate. She said that the school district already had agreed to greater consultation with the nursery school, and that a summer program probably could be worked out, although the school district's summer plans were not yet final.

The child's teacher, obviously nervous, spoke briefly, observing that the child was doing well. The mediator then separated the parties, moving the special education director and the therapist to another office. For the remainder of the three and one-half hour session, the mediator shuttled from one room to the other.

The mother refused to modify her position. She believed that the child needed one hour of physical therapy a week; independent assessments had recommended it, and she thought that the school should provide it.

Although initially maintaining that the child did not need an hour each week of physical therapy, the school people conceded in a private caucus with the mediator that there was a further hurdle: the school district had

one physical therapist (who was present) and she simply did not have the time in her schedule to provide this child with a full hour each week.

At the conclusion of one round of private sessions, the case appeared stalemated. The mother (who initially had been too nervous to speak but gradually was participating) appeared to be unyielding. The therapist was aggrieved at having her judgment questioned and her already overbooked schedule potentially swamped. The Special Education Director wanted to help the mother out, but believed that she had done all that she could.

The mediator changed the subject at this point. The school already had agreed in principle to the mother's request for greater consultation and a summer program; the details were worked out. At about this time, the teacher, who had said very little, told the mediator that she felt she might have been misleading in her earlier remarks. She said she was nervous, had never participated in mediation before, and had not known what to say. She then described in some detail the child's physical condition and the modifications the nursery school staff needed to make to enable her to participate in the regular daily program of activities.

Then the mediator reconvened the group. Agreements regarding consultation and the summer program were ratified. The teacher gave the school department personnel her view of the child's condition, and the special attention and program modification she required; the mother spoke up to say that one reason she wanted the hour a week was to help maintain the child's determination and her sense that it was important that she do her exercises, even though she often did not want to. The mediator then separated the disputants again.

The mediator caucused with the school representatives. The therapist said that she might be able to find a half hour each week. The Special Education Director told her that she did not have to disrupt her schedule. The therapist offered a specific half-hour slot.

The mother rejected the 30 minutes per week. It was clear that she would go to a hearing rather than accept anything less than the hour she had requested.

After much juggling of her schedule, the therapist eventually "found" an hour per week. The resulting agreement provided for one hour per week of individual physical therapy, together with bi-monthly consultations and a summer program of physical and occupational therapy.

# 5. Summary of Findings:

# The Mediation Process and its Results

### The Process

Interviews and observations of mediations in both California and Massachusetts reveal a striking uniformity in the process. All mediators begin with a joint session, which includes all the parties. Following the introductions, the mediator explains the process. Confidentiality and informality are stressed, as is the mediator's hope that an agreement can be reached. Some mediators contrast their own informal proceedings with a due process hearing, pointing out that in mediation, the parties can design their own agreements, satisfactory to all, whereas *no one wins* at a due process hearing, because the process is wearing and the parties often polarized.

Parents (or their advocate) always are invited to speak first, describing their child, the history of the dispute, and what it is they want. The representative of the school district or education agency then responds. Others present in the joint session, such as teachers and consultants, are then asked to speak. At the conclusion, the mediator reminds everyone that he or she will be speaking privately with one side and then the other in an effort to work out an agreement. Individual sessions with each party then follow.

In the majority of cases; this process leads to an agreement written by the mediator and reviewed by each side. The parties are brought together for a final joint session, to sign the agreement. If no agreement is reached, the mediator explains to the parents their appeal rights and, in California, writes up a list of outstanding issues for the due process hearing that will follow.

### Identity and Role of Disputants

Another significant similarity between the mediation described and most cases that go to mediation is the identity of the disputants. In the overwhelming majority of cases, it is a parent who files the appeal leading to a mediation conference, while the other party is the local school district.

Although the identity of the disputants is predictable, one of the more interesting variables is the identity of the actual participants in the mediation.

#### *The Parents*

For parents, the major decision is whether to attend the mediation conference alone or to bring someone as an advocate or representative. The use of advocates varies widely. In Massachusetts, as in California, there are individuals known as "lay advocates," who earn their living representing parents and children at mediations and due process hearings. These people are non-lawyers with extensive experience in the special education field, and a knowledge of state and federal laws governing the delivery of special education.

In Boston, advocates accompany parents routinely, while in central Massachusetts, the use of advocates is minimal. In 1983, California parents represented themselves at mediation 55 percent of the time. Lay advocates participated in 28 percent of the cases, while attorneys represented the family at mediation in 17 percent of the cases.

In addition to an advocate, parents often bring the person who conducted an independent evaluation of the child, if an evaluation was conducted. If the child is in a nonpublic school, the child's teacher also often accompanies the parents, particularly if the parent is requesting a continuation of the placement.

#### *The School District*

School districts handle participation at mediations in a number of ways. In some cases, the Special Education Director (the "SpEd" Director) attends the mediation accompanied by the entire IEP team. In other cases, the SpEd Director attends, but brings only relevant or crucial personnel. Or the SpEd Director may

attend the mediation alone, after being briefed by his or her staff.

### Time Involved

A "typical" mediation in both Massachusetts and California takes between one and five hours. The average time appears to be two to three hours.

While no statistics are available on the time involved in reaching the mediation process, the average time in Massachusetts seems to be four months (based on the cases observed). In California, where there is a 45-day deadline for completion of all procedures, the time involved in reaching mediation is substantially shorter. Mediations are scheduled within 15 days of the Superintendent's receipt of a request for a hearing. This 15-day deadline can be extended by agreement. A state scheduling official estimates that 50 percent of the sessions are held on the originally scheduled date, while the rest are continued at the request of one party.

### Proportion of Disputes Resolved

In California, of those cases where mediation was completed, mediators were involved in the successful resolution of 45.5 percent in 1981, 60 percent in 1982, and 68 percent in 1983. The percentage of *all* cases filed each year that are resolved through mediation also is increasing. In 1981, 26 percent of the petitions filed were resolved by mediation. That figure was 28 percent in 1982, and 37 percent in 1983.

In Massachusetts, 51 percent of all cases filed in the 1982-83 school year were settled through mediation. This settlement rate has been holding steady. Several years ago, on the other hand, mediators settled approximately 70 percent of all appeals. The decreased resolution rate is attributed to two developments: (1) an increase in the difficulty of the issues presented (school districts now settle most of the "easy" cases); and (2) revenue restrictions, which require some SpEd Directors to have a hearing officer's decision as justification for any significant new expenditure.

### Nature of Resolutions

Mediated special education agreements typically state that the school district agrees to specific amendments in the IEP, and that the IEP, as amended, is now acceptable and in force. Often, agreements also contain actions to be taken by the parents.

### Role of Neutrals and Techniques Used

Literature about mediation often describes the many different roles of a mediator, such as the "distinguisher of wants from needs," the "creator of options," and the "agent of reality," and the techniques used by mediators, such as listening and caucusing. In practice, the special education mediators use all of these techniques. The "agent of reality" role is often mixed with the mediator's role as interpreter of the law. A more controversial role, which is assumed by some mediators, is the "equalizer of power."

In the course of fulfilling these various roles, particularly as the agent of reality, the equalizer of power, and the interpreter of the laws, does a mediator ever cease being "neutral" and become an "advocate"? It appears, in the context of special education, *that the mediator is neutral as between the two disputants—the parents and the school district*—but may act as an advocate for the child and a guarantor of the enforcement of P.L. 94-142 and the corresponding state laws.

### Satisfaction of Disputants

Based on interviews with parents and local school officials, it is clear that disputants overall are extremely satisfied with the mediation process. Although they are not always pleased with a particular mediator or a particular outcome, parents and representatives of school districts were uniformly positive in their evaluation of mediation.

Parents are pleased with the process for several different reasons:

"The school district cannot walk all over us;"

"The mediator knew our rights and wouldn't let the school ignore them;"

"The mediator made things a lot easier by being a neutral third party and taking in both sides;"

"The mediator helped us to feel at ease and took the mystery out of the process;"

"We were able to settle the case and learned a lot;"

"It kept us out of a hearing and helped us apply pressure to the district;"

"The mediator listened to me;"

"We got what we wanted."

Parents did have some negative reactions to mediation. The expense involved was roundly condemned by one parent, who said he had spent $1,000 on advocate and legal fees. Another mother said that she did not like not knowing what was going on in the other room while the mediator was caucusing with the school officials. She was, however, happy with the outcome. Another mother noted that she fears she now carries with her the "stigma of mediation." It was her feeling that, because she had pressed her case that far, teachers were forewarned about her and were defensive, expecting an ogre. She said that while she has found that attitude difficult to deal with, she overcame it as the child's new teachers came to know her. Despite this situation, she would use the process again. Another parent, who went to her mediation unaccompanied, said that she felt like "an outsider" because the mediator and the school's SpEd Director knew each other. Nonetheless, she was not displeased with the outcome, thought the mediator was fair, and would use the process again.

School officials, not surprisingly, have a broader view of the procedure, having had more experience both with mediation and with the due process hearings that often follow unsuccessful mediation. Local school officials are much more likely than the parents who were interviewed to contrast mediation with the due process hearing. That contrast is one of the reasons they are so positive about mediation. School officials focused on the financial, emotional, and personnel costs of a due process hearing, as well as the destruction of good feeling between parents and schools in the course of the hearing.

### Nature and Effect of Imbalances of Power Between Disputants

Interviews revealed widely divergent opinions on this subject. Regardless of whether it is real or imagined, it is clear that parents think that the schools have significantly more power than they do. Explanations varied, but some comments recurred. It was pointed out repeatedly that "knowledge is power," that is, the school districts are experts in the law and the procedures, whereas parents are uninformed neophytes. Parents also tend to feel overwhelmed by the sheer numbers of school personnel, psychologists, and experts who routinely attend IEP meetings, and sometimes, mediations. And, as one observer pointed out, the whole process of dealing with a school system evokes memories of the parent's own childhood, and makes him or her, subconsciously perhaps, feel childlike, helpless, and subservient.

One effect of this perceived imbalance of power is the formation of parents' groups like TASK (Team of Advocates for Special Kids) and the Federation for Children with Special Needs. These groups believe that with sufficient training parents can assume the role of advocate for other parents at IEP meetings, mediations, and even due process hearings. They feel that unaccompanied parents are at a distinct disadvantage.

In the "typical" case we described, the mother clearly believed that the school officials had significantly more power than she. She may still believe that, because of the emotional costs associated with the process. In fact, however, the case ultimately was settled in her favor, in large part because of the school district's recognition of the parent's ultimate power: the right to take the school district through a costly due process hearing.

### Satisfaction of Interest Groups

All representatives of interest groups who were interviewed for this study said that they, and the groups they represent, are enthusiastic about the mediation process and generally recommend to parents that they take advantage of the mediation option. These interest groups seem to be supportive of mediation because it is relatively informal, effective, and far less time-consuming and draining of emotional and financial resources than the formal due process hearing.

In California, mediation is becoming increasingly popular with interest groups that support parents and children because they believe that decisions by hearing officers are becoming increasingly conservative and favoring school districts.

### Use of Information Developed Through Informal Processes

When a mediation results in an agreement, the mediator writes out the agreement and gives copies to all parties. This is the only product of the session, except for a brief report indicating the outcome—agreement, no agreement, or continuance. In the case of a failure to agree, California mediators prepare a list of issues for the due process hearing, which is signed by the petitioner. No transcript of the mediation session is kept. In Massachusetts as well, the mediation conference is entirely confidential. Massachusetts court decisions treat what occurs in a mediation as offers of settlement, which are inadmissible as evidence. The only exception is that testimony concerning what occurred in mediation is admissible to show that a parent had prior knowledge of, for example, the availability of a program that the school was offering. In neither state have mediators or files been subpoenaed. Both programs insist on total confidentiality of what occurs in the mediation, and would attempt to have any such subpoena quashed.

### Use of Precedents

The federal statute forms the backdrop against which all due process activity in special education takes place, since it sets standards which must be met. However, the more relevant law to mediators and parties is the pertinent state statutes—in Massachusetts, Chapter 766, and in California, the Education Code—which conform to Public Law 94-142. These state laws, and the regulations implementing them, play a vital role in virtually all mediations. Court decisions, as well, are relevant precedents, and are read widely by mediators, advocates, and educational administrators. Decisions by hearing officers, on the other hand, technically cannot be used as precedents for other decisions. However, these decisions are circulated among mediators in each state, and advocates, school officials, and other interested parties regularly review them. Mediated agreements are not circulated or read by anyone and have no precedential value in future cases.

### Policy and Systemic Changes

Persons interviewed in both states minimized the level of policy or systemic changes that have resulted from either mediation or from due process hearings.

# 6. Conclusion

This research was undertaken to discover whether one type of dispute between individuals and institutions can be mediated successfully. In the special education field, the answer is a resounding "yes." Satisfaction with mediation processes studied in Massachusetts and California is broad and deep.

Whether the success of mediation in the special education field can be transferred to other types of disputes between individuals and institutions is an open question. The special education context includes a number of features that may or may not be present elsewhere:

- A continuing relationship between the disputants, parents and school districts, which lasts for as long as the child is in school—potentially 18 years;
- Multi-issue disputes, in which there is much room for judgment, disagreement, creativity and, therefore, negotiation;
- Disputes over plans for the future, as opposed to actions in the past;
- Well-trained, skillful mediators, who are knowledgeable about both legal and educational issues;
- Active advocacy groups, which educate parents about their rights under the law and, on occasion, represent them at mediations and hearings;
- Individual claimants who come from all socio-economic and ethnic groups;
- A complex, yet clear, framework of laws, which have been enforced consistently;
- Federal and state statutes, which created extensive new entitlements for individuals and gave them the right to initiate and pursue their due process safeguards annually;
- A burdensome alternative to mediation—the formal due process hearing; and
- A community of interest between the disputants: the education of the child, who has needs to which all parties to these disputes generally are sympathetic.

All of these considerations contribute to the success of the programs studied. However, without comparative research, it is impossible to identify which of them is critical.

One feature traditionally seen as contributing to the success of mediation is the existence of an ongoing relationship. Obviously, that situation exists in the special education context. Public Law 94-142 and analogous state enactments give special needs children substantive and due process rights starting at age three and extending through age 21. In addition, the statutory framework gives parents the right to exercise their due process safeguards once a year.

Interviews with local school officials indicate that this consideration encourages an amicable settlement. It is less clear what effect this continuing relationship has on the parents. It may well propel parents to assert their rights early in their relationship with the schools, or whenever necessary, so that schools will not take them for granted or fail to consult with them. So, conceivably, the ongoing relationship encourages the exercise of parental rights. On the other hand, the same consideration could incline parents toward settlement at mediation, by which time they might legitimately believe that their power had been demonstrated to the school districts.

Another significant aspect of the special education context is that disputes never involve simple "yes" or "no" decisions. At issue is not whether a person does or does not qualify for public assistance or admission to medical school, for example. At issue in almost every case is an educational plan, which consists of many components and possibilities. One can speculate that the orientation towards the future and the complexity of the matters in dispute create a situation in which there is much room for negotiation and creative problem-solving.

Many of those interviewed qualified their support of mediation with the statement, "it all depends on

the mediator." Given the highly personal nature of the mediators' role, their skill is clearly a major factor in the success or failure of the process. Only one mediator in California and Massachusetts was rated ineffective by those interviewed. Those observed were very good, while some were excellent. Their dispute resolution skills, sensitivity, and substantive knowledge of special education and the law certainly have had a significant and positive effect on the programs run by these states. The assistance of well-trained advocates also contributes to the success of many mediations.

One can only speculate about the significance of the fact that the parents involved in these cases are not all poor or members of minority groups. Certainly the fact that handicaps and learning disabilities strike the rich as well as the poor has increased the visibility of special education issues and, perhaps, pressure on administrators to humanize their programs.

The consistency with which the laws have been enforced is clearly important. Many persons mentioned in the course of interviews that school districts have "finally gotten the message" about the meaning of the laws and what they are required to do to satisfy various statutory and regulatory requirements. Not all school districts are in compliance. But evidently many are making a concerted effort to comply with the laws.

Another very strong inducement to settlement is the specter of the alternative, a full-blown due process hearing. The aversion to this process is strong, and is clearly a motivating factor contributing to the resolution rate.

Public Law 94-142 mandated collaboration between parents and school districts in the interest of educating children with special needs. Perhaps, ultimately, the reason that mediation is so successful in this arena is that it is a process that nurtures rather than destroys the trust and cooperation that the framers of the governing statutes envisaged among people with an interest in the education of special children.